IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.276 OF 2004

Dadu @ Savant Digamber Waydande ...Petitioner
Vs.
Mrs. Rekha Dadu @ Savant Waydande
and Anr. ...Respondents

Shri. V.S. Kapse with Mr.Ajit Kenjale for the Petitioner.
Shri. Pratap Patil for the Respondent Nos.1 and 2.
Shri. K. V. Saste, A.P.P. for the State.

CORAM : A. S. OKA, J.
DATE : SEPTEMBER 22, 2005.

P.C.:

1. Heard the Advocate appearing for the Petitioner and the Advocate appearing for the Respondent Nos.1 and 2. Heard A.P.P. for the State. This is a petition under Article 227 of the Constitution of India where the challenge is to the order dated 01st January, 2004 passed below Exhibits 31 and 36 by the learned Judicial Magistrate, First Class, Islampur. By the said order the Petitioner-husband was directed to pay interim maintenance to the Respondent Nos.1 and 2 from the date of making the original Application under section 125 of the Code of Criminal Procedure, 1973 as directed by the order dated 21st January, 2003 in Criminal Revision Application No.29 of 2002.

2. With a view to appreciate the submissions made

by the learned Counsel appearing for the Petitioner, it is necessary to refer to facts of the case in brief. The Respondent No.1 claims to be legally wedded wife of the Petitioner. The case of the Respondent No.1 is that the Respondent No.2 is the daughter born out of the wed-lock between the Petitioner and the Respondent No.1. An Application for seeking monthly allowance by way of maintenance was made by the Respondent Nos.1 and 2 under Section 125 of the Code of Criminal Procedure, 1973 on 05th January, 2001. By Judgment and Order dated 10th July, 2002, the said Application was allowed by the learned Judicial Magistrate, First Class. The learned Judicial Magistrate, First Class directed the Petitioner to pay monthly allowance at the rate of Rs.1,000/- to the Respondent No.1 and monthly allowance at the rate of Rs.1,500/- to the Respondent No.2 from the date of the Application.

3. An Application was made by the Petitioner before the learned Magistrate praying for setting aside the order dated 10th July, 2002 and for restoration of original Application filed by the Respondent Nos.1 and 2. By order dated 16th October, 2002, the said Application was rejected. Thereafter, the Petitioner filed two separate Criminal Revision

Applications. The first one was for challenging the original order dated 10th July, 2002 and the second one was for challenging the subsequent order dated 16th October, 2002. By order dated 21st January, 2003, the learned Additional Sessions Judge, Islampur allowed both the Revision Applications and by setting aside order dated 10th July, 2002 remanded the original Application made by the Respondent Nos.1 and 2 to the Court of the learned Magistrate with liberty to the Petitioner to adduce evidence subject to the Petitioner continuing to pay the maintenance at the rate granted by the learned Judicial Magistrate, First Class as interim maintenance till the decision of the Application. It appears that the Respondent Nos.1 and 2 moved an Application in the disposed of Revision Application praying for clarification of the Judgment and Order dated 21st January, 2003. By order dated 18th June, 2003, the learned Additional Sessions Judge clarified that the interim maintenance will be payable by the Petitioner to the Respondent Nos.1 and 2 from the date of the original Application. Infact, the learned Judge observed that there was no ambiguity in the order passed on 21st January, 2003. Thereafter, on Application made by the Respondent Nos.1 and 2, the learned Magistrate passed impugned order dated 01st January, 2004 directing the Petitioner to pay interim

maintenance as directed by the Revisional Court. The learned Judicial Magistrate, First Class directed that only on production of receipts as regards payment of interim maintenance, the Petitioner will get opportunity to adduce the evidence.

4. The learned Counsel appearing for the Petitioner submitted that the Petitioner had disputed the very existence of alleged marriage with the Respondent No.1 and his contention was that the Respondent No.2 is not his daughter. He submitted that order impugned has been passed on an Application purporting to the made under Order 39, Rule 11 of Code of Civil Procedure, 1908 and obviously provisions of the said Code could not have been invoked in the proceedings under section 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code of 1973). He submitted that when the Petitioner was disputing the existance of marriage, while setting aside the order passed under section 125 of the said Code of 1973, the learned Additional Sessions Judge could not have directed the Petitioner to pay interim maintenance. He placed reliance on the decision of the Apex Court reported in **(1988) 1 Supreme Court Cases 530 (Yamunabai Anantrao Adhav Vs. Anantrao Shivram Adhav and Another).** He submitted that there

is every possibility that the Petitioner will succeed in Application under section 125 of the said Code of 1973 and therefore, if the Respondent Nos.1 and 2 withdraw the amounts which are deposited by the Petitioner, it will be impossible for the Petitioner to recover the said amounts. The learned Counsel appearing for the Respondent Nos.1 and 2 submitted that the orders passed by the Revisional Court has not been impugned in this Petition and only a consequential order passed by the learned Magistrate has been challenged. He submitted that no interference was called for. The learned Counsel for the Petitioner by way of reply also submitted that the Respondent No.1 even according to her case has approached the Court after the lapse ten long years from the date of alleged dessertion.

5. I have considered the submissions. Perusal of the original order passed on 10th July, 2002 on Application made by the Respondent No.1 shows that the Petitioner appeared in the Application and filed reply for contesting the Application made by the Respondent No.1. Perusal of the said order shows that the Respondent No.1 was cross-examined by the Advocate appearing for the Petitioner. The learned Magistrate noted that opportunities were granted to the

Petitioner to lead evidence. However, the Petitioner did not avail of the said opportunities and evidence was not lead. It is pertinent to note the observations made by the learned Additional Sessions Judge while allowing the Revision Application filed by the Petitioner and while granting opportunity to the Petitioner to lead evidence. In paragraph No.9 the learned Judge has observed thus:

> 9. One thing is clear that the revision applicant was not at all diligent in conducting the proceedings. He avoided to attend the court and avoided to pay the costs- that were saddled. Now it is his contention that he is seriously challenging his marriage with the Petitioner No.1 and paternity of Petitioner No.2. Shri. N.B. Patil learned Counsel for revision opponents has pointed out that the age of Anjana is less than the age of the Applicant and therefore, she cannot be the first wife of the opponent. There is attempt on the part of revision petitioner is to drag the litigation and to avoid payment of maintenance, to the revision opponents. As stated earlier, the blame for the

> judgment without his evidence comes on the shoulder of revision petitioner himself. Inspite of several opportunities given to him he failed to adduced his evidence.

It is thus apparent that after recording that the Petitioner was not at all diligent in conducting the proceedings, the learned Additional Sessions Judge noted that several opportunities were given to the Petitioner to adduce the evidence but he failed to do so. The learned Judge, however, observed that since the Petitioner has not lead evidence, interference was required to be made with the order of the learned Magistrate subject to the Revision Petitioner continuing to pay maintenance as per the order of the learned Judicial Magistrate, First Class by treating it as an interim maintenance. The operative part of the order passed by the learned Additional Sessions Judge reads thus:

> . The order passed by the learned Judicial Magistrate, First Class, Islampur, is set aside and the matter is remanded to the trial court with a

> direction that it will give opportunity to the revision petitioner to adduce his evidence subject to the revision petitioner continuing to pay the maintenance at the rate granted by learned Judicial Magistrate, First Class, Islampur as interim maintenance till the decision of the Petition. Parties are directed to remain present in the trial court on 20/02/2003.

In the paragraph No.9 of the Judgment, the learned Additional Sessions Judge clearly stated that final order passed by the learned Magistrate granting monthly allowance to the Respondent Nos.1 and 2 will have to be treated as the order granting interim maintenance. The operative part clearly directs the Petitioner to pay interim maintenance at the rate granted by the Judicial Magistrate, First Class by order dated 10th July, 2002. Paragraph No.9 makes it very clear that the condition which was imposed by the learned Additional Sessions Judge was to pay maintenance as per the order of the learned Judicial Magistrate, First Class which was set aside. It is pertinent to note that the Petitioner did not challenge the order dated 21st January, 2003.

6. It appears that on the basis of the order of the learned Additional Sessions Judge, the Respondent No.1 applied under section 125(3) of the said Code of 1973 and prayed for distress warrant against the Petitioner. While resisting the said Application, a contention was raised by the Petitioner that the Sessions Court directed payment of interim maintenance only from the date of order of the Sessions Court. In view of the said stand taken by the Petitioner, an Application was moved by the Respondent Nos.1 and 2 for clarification before the Sessions Court. By order dated 18th June, 2003 the Sessions Court observed that there was no ambiguity in the order passed in the Revision Applications. Nevertheless, the Sessions Court held that the Petitioner is liable to pay maintenance from the date of the filing of the original Application under section 125 of the said Code of 1973. This order dated 18th June, 2003 was not challenged by the Petitioner by filing any proceedings. As the Petitioner did not pay the amount, the Respondent No.1 filed an Application purporting to the Application under Order 39 Rule 11 of the Code of Civil Procedure, 1908 for striking out the defence. An application was also made by the Petitioner before the learned Magistrate seeking direction that the Application under

section 125 of the said Code of 1973 should be disposed of expeditiously. On both the Applications, the learned Magistrate passed the order impugned dated 01st January, 2004 directing the Petitioner to comply with the order passed in the Revision Application and further directed that only on compliance with the order, the Petitioner will be permitted to adduce the evidence.

7. It must be borne in mind that order dated 21st January, 2003 as well as the order dated 18th June, 2003 passed by the Sessions Court have not been challenged by the Petitioner. The present Petition is filed on 09th February, 2004 where the challenge is limited to order dated 01st January, 2004 passed by the learned Judicial Magistrate, First Class.

8. It is obvious that the provision of law which is mentioned in cause title of the Application made by the Respondent No.1 is wrong and provisions of the Code of Civil Procedure, 1908 could not have been invoked. However, merely because incorrect provision of law is mentioned in the Application, that does not prevent the Trial Court from considering the Application in accordance with law. It is pertinent to note that once

it was brought to the notice of the learned Magistrate that there was a non-compliance with the order passed by the Sessions Court of payment of interim maintenance, more stringent order under sub-section 3 of section 125 of the said Code could not have been passed by the Judicial Magistrate. Even after noticing that the orders passed by the Sessions Court have not been challenged by the Petitioner, the learned Judicial Magistrate thought it fit to pass the limited order directing the Petitioner to pay the amount instead of directing further coercive action against the Petitioner which was well within the jurisdiction of the learned Magistrate. In my view, if the Petitioner was bound by the orders of the Sessions Court, there was no other option available to the learned Magistrate except to direct compliance with the said order. Without challenging the orders passed by the Sessions Court, there is absolutely no merit in the challenge made in order dated 01st January, 2004.

9. Though there is no specific challenge to the orders passed by the Sessions Court, I have nevertheless considered the submissions made by the learned Counsel appearing for the Petitioner. The order of the Sessions Court dated 21st January, 2003 records that the Petitioner was not diligent and

several opportunities were granted by the learned Magistrate to him to lead evidence. It is obvious that only by way of indulgence, Additional Sessions Judge thought it fit to give an opportunity to the Petitioner to lead evidence and therefore, he observed that interference with the order of the learned Magistrate was found necessary subject to the Petitioner continuing to pay maintenance as per the order of the learned Magistrate. All that was done by the Additional Sessions Judge was to direct order of remand with a rider that the final order granting maintenance will be treated as an interim order. In my view, while passing an order of remand, the learned Additional Sessions Judge was fully justified in imposing the condition which he has imposed. Even treating this Petition as a Petition challenging the orders of the Sessions Court which are infact not challenged, interference under Article 227 of the Constitution of India is not permissible. Even assuming that the direction is illegal, when substantial justice has been done by the Sessions Court, interference is not called for under Article 227 of the Constitution of India.

10. An apprehension is expressed that the Respondent Nos.1 and 2 will withdraw the amounts and in the event of success of the Petitioner in the pending

application, it will be difficult to recover the said amounts. To a limited extent, Petitioner can be protected by permitting the Respondent No.1 to withdraw the amounts deposited by way of interim maintenance payable to the Respondent Nos.1 and 2 after giving an undertaking to the learned Magistrate to re-deposit the amounts in the event the Petitioner succeeds in getting the Application under section 125 of the said Code of 1973 dismissed.

11. Hence, I pass the following order:

: O R D E R :

i) The Petition is dismissed.

ii) Time of three months from today is granted to the Petitioner to comply with impugned order dated 01st January, 2004.

iii) The Respondent No.1 is permitted to withdraw the amount of interim maintenance payable to herself and to the Respondent No.2 subject to giving an undertaking in writing to the Trial Court to re-deposit the amounts in the event the Application under section 125 of the said Code of 1973 is finally decided against

the Respondent Nos.1 and 2.

iv) All contentions of the parties on merits of the Application under section 125 of the said Code of 1973 are expressly kept open.

JUDGE